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IN THE

Supreme Court of the United States

October Term, 1961

No. 260

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Local 239, International Brotherhood of Teamsters, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on May 4, 1961, enforcing an unfair labor practice order issued by the National Labor Relations Board.

Opinions Below

The opinion of the court below (Appendix A, *infra*, pp. 17-26) is reported at 289 F. 2d 41. The findings of fact, conclusions of law and order of the National Labor

Relations Board (J. A. 8-18*) are reported at 127 N. L. R. B. No. 132.

Jurisdiction

A judgment of the Court of Appeals was entered on the petition for enforcement of an order of the National Labor Relations Board on May 4, 1961 (Appendix B, *infra*, pp. 27-28). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Whether it is an unfair labor practice under Section 8(b)(7)(C) of the Act for a Union to engage in peaceful picketing for 13 days (or 17 calendar days until November 30) after the effective date of the Act without filing a petition for an election?

2. Under Section 8(b)(7)(C) of the Act providing for picketing for a reasonable period of time not to exceed 30 days, can the 30 day period be reduced because of lawful picketing conducted prior to the effective date of the Section 8(b)(7)?

3. Does orderly and peaceful picketing of the primary employer result in "forcing or requiring" recognition?

4. Should all picketing be enjoined if one of the objects is to truthfully advertise to the public that the employer does not have a contract with a labor organization?

5. (a) Under the Second Proviso of Section 8(b)(7)(C) of the Act, does picketing, otherwise lawful, become unlawful, if anyone pays sufficient attention to refuse to cross the picket line?

* The reference "J. A." designates the portion of the record printed as a Joint Appendix to the briefs in the Court of Appeals.

(b) Does the Second Proviso to Section 8(b)(7)(C) of the Act under all circumstances preserve the right to picket in order to advise the public that an employer is nonunion?

(c) If the answer is "NO", is Section 8(b)(7)(C) unconstitutional under the First Amendment to the U. S. Constitution as a restraint against peaceful picketing which has no unlawful purpose?

(d) Can the protection of the Second Proviso be lost if the picketing Union does not actually intend to affect deliveries but deliveries are nevertheless affected because persons refuse to make deliveries by reason of the mere presence of the picket line?

6. Does the Second Proviso preserve labor's traditional means of communication (*i.e.* picketing, the purpose of which is to advise the public of the nonunion status of the employer) despite the existence of a proscribed object?

Statute Involved

This case involves one of the provisions of the Labor-Managment Reporting and Disclosure Act of 1959. Section 704(c) of the Act, 73 Stat. 544, added a new Union unfair labor practice. Section 8(b)(7), 29 U. S. C. 158 (b) (7), the clause creating the new unfair labor practice, provides, in the part here pertinent, that it shall be an unfair labor practice for a labor organization of its agents

> "(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is cur-

rently certified as the representative of such employees.
• • •

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this sub-paragraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

Statement of the Case

A. The Facts

On September 21, 1959 Petitioner (herein called "the Union") began to picket Stan-Jay Auto Parts & Accessories Corp. (herein called "Stan-Jay") in an attempt to organize Stan-Jay's employees (J. A. 18-19). These employees had never been represented by any labor organization (J. A. 22). The picketing was "orderly and peaceful" (J. A. 27). On November 13, 1959, Section 8(b)(7) became effective. On November 23, 1959 Stan-Jay filed an unfair labor practice charge under Section 8(b)(7), which was mailed by the Board's regional office to the Union on November 25 and received by it on Thanksgiving Day, November 26 (J. A. 29, footnote 6).

On November 25, the Board's Regional Director telegraphed the Union notifying it that unless a petition for an election was filed no later than Friday November 27, a complaint would issue under Section 8(b)(7) (J. A. 58). November 26 was a legal holiday—Than' sgiving Day—the Board's offices were closed for business. The Union was thus notified that unless it filed a petition on the very day it was given notice of the filing of unfair labor practice charges, the Board's Regional Director would issue a complaint under Section 8(b)(7).

No petition having been filed by the Union, on November 30, the complaint issued and on December 2 the Regional Director applied for a Section 10(1) injunction which subsequently was issued. *McLeod v. Local 239*, D. C. E. D. N. Y. 179 F. Supp. 481.

Since November 24, the Union picket signs were in the language of the Proviso in Section 8(b)(7)(C)—of an informational nature advertising Stan-Jay's nonunion status (J. A. 29). The new signs read: "To the public. Please be advised Stan-Jay * * * does not employ members of, nor has a contract with any labor union * * *" (J. A. 28).

In addition to the 8(b)(7) complaint, another complaint issued on November 19th charging a violation of Section 8(b)(1)(A) by reason of the picketing which started on September 21 (J. A. 18-19).

B. The Trial Examiner's Findings and Conclusions

The Trial Examiner found the picketing was orderly and peaceful (J. A. 27). He found that the picketing since September 21, 1959 violated Section 8(b)(1)(A) (J. A. 37). [However, when the case reac[illegible] the Board this court had decided *N. L. R. B. v. Drivers Union Local 639*

(Curtis Bros.), 362 U. S. 274 holding that peaceful minority picketing was not violative of Section 8(b)(1). The Board dismissed the 8(b)(1) complaint (J. A. 9, footnote 1)].

The Trial Examiner found that about 90 per cent of the employees engaged in Stan-Jay's line of business had collective bargaining contracts with the union; that the union holds to the philosophy that unorganized employers in the industry are in a position, because of their inferior employment standards, to compete unfairly with employers who are under contract with the Union; that non-union employers thus represent a threat, not only to the economic security of their organized competitors, but derivatively to the preservation of the labor standards enjoyed by the employees in the organized segment of the industry (J. A. 22).

The Trial Examiner found that 17 days of peaceful picketing from November 13—the effective date of section 8(b)(7)—until November 30, constituted more than a reasonable period of time within the intendment of Section 8(b)(7)(C), because of the pre 8(b)(7) picketing which started on September 21 (J. A. 42).

Prior to November 13, 1959, Stan-Jay adopted the practice and procedure of sending its own trucks to its suppliers to pick up merchandise (J. A. 31). Since October in ordering merchandise, it had not asked suppliers to make deliveries to its premises (J. A. 96). Two drivers refused to cross the picket line as a matter of personal principle. The third did not make the delivery because his boss (Quality Brakes) told him not to cross the line (J. A. 32, footnote 10). The third driver testified as a Board's witness that although he was a member of the picketing Un-

ion, the Union told him it "couldn't stop me from going in", but it was up to him whether he went in or not—a matter of personal principle (J. A. 171-172). There was a back delivery entrance that was not being picketed (J. A. 149).

One of the Board's witnesses testified that his driver "didn't refuse to make" deliveries. In fact, although the driver went into the store to pick up merchandise, the reason he didn't pick up was "that there was nothing ready for him" (J. A. 113-114).

Another Board witness testified that as a good union man he would not cross the picket line. No one from the Union spoke to him (J. A. 165). A Railway Express employee testified that he personally does not cross picket lines (J. A. 167-168).

In fact, one supplier would not sell the Company unless it picked the merchandise up itself at the seller's premises (J. A. 94-95).

The Trial Examiner commented that truckdrivers who are members of the Teamsters are reluctant to cross a picket line; that the picketing had the actual effect of interfering with deliveries; that the intended effect as shown by the above facts, was immaterial (J. A. 48-49).

The Trial Examiner found a violation of the Act and said the Union lost the benefit of peaceful informational picketing under the second proviso.

C. The Board's Conclusion and Order

Respondent Board found that the Petitioner violated Section 8(b)(7)(C) of the Act. The Board ordered that Petitioner cease and desist from all picketing (J. A. 8-17). It found that:

> "The picketing for organization and recognition had been going on continuously for almost 2 months before the new Act became effective. In the light of this background, we agree with the Trial Examiner that the 17 days of additional picketing thereafter was a reasonable period of time in which to require the Respondent to file a representation petition or face enjoinment of the picketing."

The Board's Order, as enforced by the Court of Appeals, requires the Union to cease and desist from all picketing.

D. The Decision of the Court Below

The court below granted enforcement of the Board's order. In the court's view, this case raised only a substantial evidence question, and the court rejected Petitioner's contention that a critical question of statutory interpretation was involved. The court concluded that there was substantial evidence to support the conclusion that a reasonable period of time in which the Union could campaign for support before filing for a representation election had expired thirteen (13) days after the effective date of the Act, in the light of lawful peaceful picketing by the Union for a substantial period of time prior to the effective date of the Act. The court concluded that "in the light of the pre-November 13 picketing, we cannot find erroneous the Board's determination that a reasonable period of time * * * had expired by November 30."

The court rejected Petitioner's contention that its peaceful picketing constituted lawful traditional primary activity and that a " 'reasonable period of time not to exceed thirty days' must be read to mean 'thirty days' in the absence of 'unusual compelling and extenuating circumstances' ".

The court below mistakenly construed the Act to prevent the peaceful picketing by petitioner and Section 8(b)(7)(C) as so construed, infringes the First Amendment of the Constitution of the United States.

Reasons for Granting the Writ

1. The Issue Is of the Utmost Importance.

The incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification, *Local 761 I. U. E. v. NLRB*, 364 U. S. 869. The question whether Section 8(b)(7)(C) of the Act interdicts peaceful picketing in less than thirty (30) days is of major importance, not only in the administration of the Act, but also in the conduct of labor-management relations generally, *Mastro Plastics Corp. v. NLRB*, 348 U. S. 910. Unions frequently utilize this economic weapon to further their goals, and a decision as to its propriety would obviously have a significant bearing on the balance of power in labor disputes affecting commerce. The Board has been, on a case by case basis, determining what period less than 30 days is reasonable. "To leave the determination of a reasonable period to *ad hoc* adjudication after the event is to require that important rights be exercised at the risk of being condemned as illegal without any knowable standard by which to judge in advance where the line between the licit and the illicit is drawn." (A Preliminary Look at Section 8(b)(7), Bernard Duvan, 48 The Georgetown Law Journal 371, 376, Winter 1959).

In these circumstances a resolution of the question by this court is clearly appropriate.

This case presents the important constitutional question of whether Section 8(b)(7) was intended by Congress, or

can be used as a device by the Board, to outlaw peaceful and orderly primary picketing. The type of picketing herein challenged is commonly known as "organization" or "recognition" picketing, and consists of peaceful picketing of a primary employer by a labor organization for the purpose of obtaining organization and recognition as bargaining representative.

This case necessarily raises the question, to what extent did Congress seek to outlaw peaceful picketing for recognition and to what extent should labor unions be permitted constitutionally to use peaceful picketing as a technique for organizing employees and advertising the non-union status of an employer.

Section 7 of the Act includes in the rights therein mentioned, the right of Union employees to seek, by picketing and other peaceful means, to extend organization and collective bargaining relationships throughout an entire trade or industry as a means of establishing competitive wage rates and working conditions within such areas, and this right has long been recognized by the courts.

American Steel Foundries v. Tri-Cities Central Trades Council, 257 U. S. 184, at 209; *Apex Hosiery Co. v. Leader*, 310 U. S. 469. This court noted in *Apex Hosiery Co., supra*, at 503 that the elimination of competition from non-union made goods was a legitimate labor objective. Section 7 of the Act indeed recognizes that principle in its guarantee that "employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Exchange Bakery v. Rickin*, 245 N. Y. 260; at 263.

Congress, in Section 7 of the Act, gave broad protection to the right of picketing for the purpose of mutual aid

and protection, including the right to picket for recognition, but it did not stop there. Perhaps fearful of administrative attempts to nullify such right through a process of interpretation, it enacted Section 13, under which it made clear that "all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the Union's traditional right to strike, may be so read only if such interference, impediment or diminution is specifically provided for in the Act' ". (*NLRB v. International Rice Milling Co.*, 341 U. S. 665.)

An issue of grave importance in the administration of the National Labor Relations Act and affecting the customary functioning of labor organizations under such Act is involved under the instant petition for certiorari.

2. The Decision of the Court Below is in Conflict with Decisions of this Court.

The decision below fails to follow the applicable principles of law enunciated by the court in *N. L. R. B. v. Drivers Local Union*, 362 U. S. 274 and in *United Rubber Workers v. N. L. R. B.*, 362 U. S. 274, wherein it was held that peaceful recognition picketing does not amount to "restraint or coercion" under the Act.

In *N. L. R. B. v. Drivers Local Union, supra*, this court held that "restrain or coerce" did not encompass peaceful minority picketing to obtain recognition, and in so doing, expressed the view that such language was a grant of power to the Labor Board limited to authority to proceed against Union tactics involving more than the general pressures upon persons employed by the affected employers implicit in peaceful picketing.

"Congress has been rather specific when it has come to outlaw particular economic weapons on the part of

unions." *N. L. R. B. v. Insurance Agents*, 361 U. S. 80 S. Ct. 419, 432. By Section 8 (b) (7) Congress did not desire to regulate all recognition or organizational picketing. It merely regulated that kind of picketing which has as an object "forcing or requiring" recognition. All picketing has in it elements of coercion and restraint; yet if Congress had intended to prohibit all organizational and recognitional picketing, it would unquestionably have done so directly rather than indirectly as "forcing or requiring". See *N. L. R. B. v. I. B. of T.*, 272 F. 2d 85, 89 (C. C. A. 2).

In *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665, 672-673, this court ruled that inducements to respect a primary picket line do not result in "forcing or requiring" an employer for the proscribed object or recognizing or bargaining with the picketing union as the representative of its employees.

But not all so-called recognitional or organizational picketing was outlawed in Section 8(b)(7). Concededly, picketing has in it elements of persuasion and influencing others at least through the solicitation of the support of public opinion. Yet, if Congress had intended to prohibit all organizational and recognitional picketing, it unquestionably would have done so directly rather than indirectly as "forcing or requiring".

Recently, this court in *Local 761, International Union of Electrical, Radio & Machine Workers v. N. L. R. B.*, ____ U. S. ____, 81 S. Ct. 1285, 1289, stated:

> "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.*, at page 591. "Almost all picketing, even

> at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." Local 294, *supra*, 284 F. 2d at page 890. "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. *National Labor Relations Board v. International Rice Milling Co., supra.*"

The Act contains three different types of situations. One, to "induce or encourage" (Sec. 8(b)(4)), another phrase "restrain or coerce" (Sec. 8(b)(1)), and a third phrase "forcing or requiring" (Sec. 8(b)(4)). Prior to the recent amendments to the Act, the phrase "forcing or requiring" were used only in secondary boycott situations under Section 8(b) of the Act. Picketing a secondary employer for the purpose of bringing pressure thereby on the primary employer has been held to be "forcing or requiring" because of the secondary boycott activities involved. Peaceful picketing directly of the primary employer is at best inducing or encouraging rather than "forcing or requiring".

In *IBEW v. N. L. R. B.*, 341 U. S. 694, 701-3, this court indicated that the phrase "induce or encourage" is broad enough to include every form of influence and persuasion and thereby includes peaceful picketing. If Congress intended in Section 8 (b) (7) to outlaw all peaceful picketing for recognition or organizational purposes, it could have clearly said so by stating that picketing which has as an object "inducing or encouraging" recognition or organizational purposes should be outlawed. Instead of doing this, it used the more restricted phrase "forcing or requiring". The phrase "forcing or requiring" when used in

connection with primary picketing must refer to the use of some illegal means. See *Van Arkel "Picketing under the 1959 Amendments"*, 13 N. Y. U. Annual Conference on Labor 201, 207. If the language "forcing or requiring" was intended to outlaw all peaceful picketing, then Section 8 (b) (7) constitutes a blanket prohibition upon peaceful primary picketing, and it would violate the first amendment to the United States Constitution. *Chauffeurs Union v. Newell*, 356 U. S. 341; *Thornhill v. Alabama*, 310 U. S. 88, 97-98. The mere fact that there is picketing does not automatically justify its restraint, *Thornhill v. Alabama, supra.* That *Thornhill* is not completely moribund is evidenced further by this Court's summary reversal, simultaneously with the granting of certiorari in *Newell, supra.*

3. There is Nothing Illegal in a Union Protecting the Standards of its Members by Advertising to the Public the Non-Union Status of a Particular Employer.

Solicitor General Archibald Cox in a monograph entitled "Law and the National Labor Policy" takes the position that despite the concern of the law with preserving to each employee the right to freedom of choice regarding Union representation, Unions may protect the standards of their members not alone by achieving majority designations but also, if they cannot organize the majority by driving the production of non-union labor off the market or driving the wages and working conditions of non-union employees up to the Union level, when this is essential to preserve Union standards. Thus, in commenting on Section 8 (b) (7) of the National Labor Relations Act, enacted subsequent to events here involved, the monograph states (at pages 27-28):

> "Banning organizational picketing after an N. L. R. B. election partially rejects the struggle for life, for it

prefers the nonunion employees' interest in self-determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. Suppose, however, that a union were to picket for the avowed purpose of publicizing the low wages paid in an establishment, without becoming the bargaining representative, in order to compel the owner to raise his wages to the union scale or else to prevent the distribution of the low-cost, nonunion goods in direct competition with the product of union labor. NLRA section 8 (b) (7) prohibits picketing only

> where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or * * * the employees of an employer to accept or select such labor organization as their collective bargaining representative * * *

"The very few men close to the drafting of the Conference Report who understood this problem had no common intention—perhaps 'had conflicting intentions' would be a better phrase. Presumably, the N. L. R. B. will follow the decisions under section 8(b)(4)(C) which hold that picketing in support of a demand which is customarily made in collective bargaining is picketing for recognition. I am inclined to think that the rule is wrong in principle, and it is opposed by judicial rulings distinguishing organizational picketing from picketing to protest competition of non-union goods. The prohibition seeks to protect the employees' decision concerning union representation, not their freedom to work at substandard wages without reprisal from those whom they injure. The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the employees' decision concerning union representation. There is some risk that this approach would encourage the kind of verbal evasions which I criticized earlier, but the danger can be eliminated by treating the union's objective as a question of fact which requires looking behind the ostensible purpose. Regardless of what the union may say, recognition is an objective of any picketing of an unorganized shop.

> but the force of this presumption, based upon experience, can be dissipated by proof that the labor conditions of which the union complains are presently such an immediate and substantial threat to existing union standards in other shops through the force of competition as to support a finding that the union has a genuine interest in compelling the improvement of labor conditions or eliminating the competition even though the union does not become the bargaining representative." (Footnotes omitted.)

We agree with Solicitor General Cox that there is nothing in the law which prevents a union from protecting the standards of its members by either eliminating the non-union labor or requiring that non-union labor receive union wages and conditions.

Conclusion

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 271—October Term, 1960.

(Argued February 24, 1961 Decided April 17, 1961.)
Docket No. 26600

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

Before:

HINCKS and MOORE, *Circuit Judges,*
and BRENNAN, *District Judge.**

The N. L. R. B. petitions for enforcement of its order finding that respondent union committed an unfair labor practice under Section 8(b)(7)(C) of the Taft-Hartley Act, as amended in 1959. *Enforcement granted.*

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* Sitting by designation.

Appendix A

JAMES C. PARAS, Atty., National Labor Relations Board, Washington, D. C. (Stuart Rothman, Gen. Counsel, Dominick L. Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Frederick U. Reel, Atty., N. L. R. B., Washington, D. C., on the brief), *for petitioner.*

CHARLES R. KATZ, New York City, *for respondent.*

HINCKS, *Circuit Judge:*

This case involves one of the provisions of the Labor-Management Reporting and Disclosure Act of 1959. Section 704(c) of the Act, 73 Stat. 544, added a new union unfair labor practice to the National Labor Relations Act of 1935, § 8, 49 Stat. 449, as amended, Labor-Management Relations Act of 1947, 61 Stat. 141, 29 U. S. C. § 148. Section 8(b)(7), 29 U. S. C. A. § 158(b)(7), the clause creating the new unfair labor practice, provides, in the part here pertinent, that it shall be an unfair labor practice for a labor organization or its agents

> "to picket or cause to be picketed * * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."[1]

As found by the Trial Examiner, the facts are these. The employees of Stan-Jay Auto Parts & Accessories Corp., a corporation engaged in interstate commerce and within the N. L. R. B.'s jurisdictional limits, had never been represented by a labor organization. In September 1959, the respondent [hereinafter "the union"] began to picket Stan-Jay. There is no doubt that the union's pur-

[1] Subsections (A) and (B) are not involved in this case. They respectively prohibit picketing with an object of forcing or requiring recognition or organization (A) when the employer has lawfully recognized another labor organization and when a question concerning representation may not appropriately be raised under § 9(c), and (B) when a valid § 9(c) election has been held within the preceding 12 months.

pose at that time was to obtain recognition or organization. This picketing was "orderly and peaceful." The picket signs read, in pertinent part, "Local 239 * * * wants the employees of Stan-Jay [sometimes supplemented with the words "is stingy"] * * * to join them to gain union wages, job security and working conditions."

On November 13, 1959, section 8(b)(7) became effective. On November 23, Stan-Jay filed an unfair labor practice charge, which was mailed by the regional office of the Labor Board to the union on November 25, and received by it on Thanksgiving Day, November 26. On November 25, the Regional Director telegraphed the union requesting it to inform him whether it intended to file a representation petition and notifying it that unless a petition was filed by close of business Friday, November 27, a complaint would be issued and an injunction sought under § 10(L). No petition having been filed by the union, on November 30 the unfair labor practice complaint was issued. On December 2, the Regional Director applied for a 10(L) injunction which was issued on January 21, 1960. *McLeod v. Local 239, Int'l Brotherhood of Teamsters*, D. C. E. D. N. Y., 179 F. Supp. 481, 182 F. Supp. 949.

Sometime after November 24, the union changed its picket signs from the clearly recognition-organizational ones quoted above to signs following the language of the second proviso to § 8(b)(7)(C). The new signs read: "To the public. Please be advised Stan-Jay * * * does not employ members of, nor has a contract with any labor union including Local 239, I. B. of T."

On June 1, 1960, the Labor Board issued its Decision and Order, 127 N. L. R. B. No. 132, finding that the union

had committed an unfair labor practice and ordering it to cease and desist from picketing Stan-Jay "under conditions prohibited by 8(b)(7)." We have jurisdiction over this petition for enforcement, the alleged unfair labor practices have occurred in Long Beach, New York, within this circuit. Section 10(e), 29 U. S. C. A. § 160(e).

The union makes essentially three arguments designed to show that its activity was outside the ambit of § 8(b)(7)(C). It argues (1) that its activity was not covered by the preamble of § 8(b)(7) because, it claims, (a) recognition or organization was not an "object" of its post-November 13 picketing, and (b) even if an "object" of the picketing was recognition or organization, the picketing did not have an object of "forcing or requiring" recognition or organization; (2) that its activity was not covered by § 8(b)(7)(C) because it was not afforded a "reasonable time" to picket without petitioning for election under § 9(C); and (3) that its activity was exempted from § 8(b)(7)(C) by the second proviso thereto inasmuch as (a) it had the purpose of truthfully advising the public that Stan-Jay does not employ members of, or have a contract with, a labor organization, and (b) it did not have the effect of inducing any person not to pick up or deliver.

The union's argument that recognition or organization was not "an object" of its post-November 13 picketing is disposed of easily. The Examiner and the Board, in concluding that such "an object" existed after the effective date of § 8(b)(7), took into consideration the clearly recognition-organizational object of the union before November 13. This, urges the union, presumes the existence of an

illegal act. But a sign with a clearly recognition-organizational purpose continued to be used for at least eleven days after § 8(b)(7) took effect, indicating that the union's object, like its sign, had not changed, and on November 20, the union's business agent proposed a "deal" whereby the picketing would cease (and would begin at one of Stan-Jay's nonunion competitors) in consideration of two of Stan-Jay's three employees joining the union and in further consideration of a contract with a union-shop clause. It follows that the proscribed, recognition-organization, object (which, in any event, would not have been "illegal" had the union filed a representation petition within a reasonable time) was not presumed to have continued from before November 13, but was independently proved. Thus our decision in *N. L. R. B. v. Local 50, Bakery Workers*, 2 Cir., 245 F. 2d 542, is inapplicable. The pre-November 13 evidence, was, at most, circumstantial evidence which corroborated the post-November 13 evidence, or was used as a background against which to interpret the post-November 13 facts.

The union's argument that its object was not to "force or require" recognition or organization is premised on the notion that the statutory language contemplates physical violence or threats thereof. But the setting of the language makes it clear that "forcing or requiring" refers to the intended effect of the picketing, not the manner in which the picketing is carried on, to the "object," not the method, and it is clear that the union's object was swiftly to compel organization or recognition, not merely to create a climate in the shop favorable to the union. The phrase "forcing or requiring" was used in § 8(b)(4) before the passage of

the 1959 amendments, see 29 U. S. C. A. § 158(b)(4)(A), (B), (C), (D), and the case law thereunder does not require violence. See *e.g., N. L. R. B. v. Enterprise Ass'n of Steam, etc. Pipefitters, Local No. 638*, 2 Cir., 285 F. 2d 642, 645, where we found an entirely peaceful refusal to install pipe to have as its object "forcing or requiring any employer to cease using, * * * or otherwise dealing in the products of any other producer or to cease doing business with any other person" in violation of § 8(b)(4)(A). And see the discussion of the instant problem in Comment, 69 Yale L. J. 1393, 1398. The fact that picketing, which involves the use of speech, is the subject-matter of § 8(b)(7) does not change the meaning of "forcing or requiring." And the union's argument is no more persuasive when cast in constitutional language. *Cf. Greene v. International Typographical Union*, D. C. D. Conn., 182 F. Supp. 788, 792-93. It is true, of course, that *N. L. R. B. v. Drivers Local No. 639*, 362 U. S. 274, the *Curtis Bros.* case, held that peaceful recognition picketing does not amount to "restraint or coercion" of rights guaranteed by § 7, 29 U. S. C. A. § 157, which made it an unfair labor practice under § 8(b)(1)(A), and that the Supreme Court referred to "the sensitive area of peaceful picketing." And see *N. L. R. B. v. International Brotherhood of Teamsters, Local 182*, 2 Cir., 272 F. 2d 85. But this cannot be said to amount to a holding that peaceful picketing can constitutionally be said to have the object of "forcing or requiring" only if it involves violence. Indeed, *Curtis Bros.* itself, 362 U. S. at 291, notes that § 8(b)(7) "proscrib[es] * * * peaceful organization strikes in many situations."

Thus the Union's activity is within the preamble to § 8(b)(7) (quoted above), and the inquiry shifts to subsection (C). Organizational or recognition picketing by an uncertified Union is barred under that subsection if the Union fails to file a petition for an election "within a reasonable period of time not to exceed thirty days from the commencement of such picketing." The Union claims it was not given such a reasonable period of time after November 13. By its own count, however, it picketed for 13 days after the effective date of § 8(b)(7) without petitioning for an election. In the light of the pre-November 13 picketing, we cannot find erroneous the Board's determination that a reasonable period of time in which the Union could campaign for support had expired by November 30. The Union suggests that a "reasonable period of time not to exceed thirty days" must be read to mean "thirty days" in the absence of "unusual compelling and extenuating circumstances," lest it be in danger of being so vague as to violate due process or constitute an unconstitutional delegation to the Board of legislative power. The statute plainly contemplates thirty days as the outer limit, with power in the Board, subject to review by the courts, to fix shorter periods as "reasonable" ones according to particular fact situations. See Comment, 69 Yale L. J. 1393, 1424; 105 Cong. Rec. 18153 (remarks of Mr. Griffin). And as so construed, the constitutionality of this clause stands unimpaired. The standard of "reasonableness," employed daily by judges and administrators in countless rules of decision, is sufficient to shield authority granted an administrative agency from constitutional attack, just as is, for example, the standard of "the public interest," see *New York*

Appendix A

Central Sec. Corp. v. United States, 287 U. S. 12, 24; *McManus v. CAB*, 2 Cir., 286 F. 2d 414.

The Union contends that it was not afforded a reasonable period of time to invoke the expedited procedure of § 8(b)(7)(C). But under that section all the Union had to do was to file "a petition under section 9(c) * * * within a reasonable period of time not to exceed thirty days from the commencement of such picketing." We think the record amply supports the Board's finding that this was not done that by November 27 the Union had had reasonable opportunity to file a simple representation petition. The Union makes much of the Board's practice under its Regulations, 29 C. F. R. Sections 102.73-102.82, whereby the filing of a *bona fide* charge is a prerequisite to the expedited procedure envisaged by § 8(b)(7)(C). It apparently argues that the effect of the practice here was to cut down from 12 to 2 days the time within which it could "invoke the expedited procedure." But this argument loses sight of the fact that in every § 8(b)(7)(C) case, to validate the continuation of organizational picketing the Union must file "a petition under 9(c)". Whether thereupon the Board will invoked the expedited procedure is another matter. We base our decision, therefore, upon the holding that the statute does not give the Union a "right" to expedited procedure when it fails to file a representation petition.[2]

The Union attacks the Board's findings and conclusions with respect to the second proviso of § 8(b)(7)(C). This exempts from the operation of subsection (C) picketing

[2] For criticism of the practice, see Aaron, The Labor Management Reporting and Disclosure Act, 73 Harv. L. Rev. 1086, 1108-09. The practice was approved in *Reed v. Roumell*, D. C. E. D. Mich., 185 F. Supp. 4.

"for the purpose of truthfully advising the public" that the picketed shop is nonunion, but excepts from the exemption picketing which has the secondary effect of halting deliveries. Various interpretations of the exemption are possible. The Board did not make a finding as to whether this picketing was within the exemption's scope, because it thought that, in any event, the picketing had the proscribed secondary effect. We agree. The Union argues that the delivery-stoppage, if any, was caused by a notice sent to suppliers informing them of the picket line, not by the picket line itself. But whether such a hair-splitting distinction is meaningful we do not need to decide. For the Examiner found "the picketing" to be the cause of cessation and our study of the record reveals testimony to support that finding. The Union also predicates error on the fact that the Examiner recited post-complaint evidence of delivery cessation. But this is of no moment. There was substantial pre-complaint evidence sufficient to support the Examiner's crucial findings on this point. Moreover, § 10(b) gives the Board "power to issue * * * a complaint *stating the charges*," and we think that *N. L. R. B. v. Fant Milling Co.*, 360 U. S. 301, holding that the Board may utilize post-charge evidence, is equally applicable to post-complaint evidence.

Enforcement granted.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

No. 26600.

DECREE

Before: Hincks and Moore, Circuit Judges, and Brennan, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on June 1, 1960. The Court heard argument of respective counsel on February 24, 1961, and has considered the briefs and transcript of record filed in this cause. On April 17, 1961, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and

that Local 239, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, its officers, representatives and agents, abide by and perform the direction of the Board in said order contained.

C. C. HINCKS,
Judge, United States Court of Appeals for the Second Circuit.

LEONARD P. MOORE,
Judge, United States Court of Appeals for the Second Circuit.

FILED: May 4, 1961

A true copy,

A. Daniel Fusaro
Clerk

by Niall F. O'Doherty
Chief Deputy Clerk.